

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TITO DAVID VALDEZ, JR.,

No. C 05-4443 SI (pr)

Plaintiff,

ORDER OF SERVICE

v.

JEANNE WOODFORD; et al.,

Defendants.

INTRODUCTION

Tito David Valdez, Jr., a California prisoner at the Correctional Training Facility in Soledad, has filed a pro se civil rights action under 42 U.S.C. § 1983. His complaint is now before the court for review pursuant to 28 U.S.C. §1915A. His motion for appointment of counsel also is before the court for consideration.

BACKGROUND

This action concerns a regulation that restricts certain incarcerated sex offenders from visiting with children. Although Valdez's very repetitive complaint is 60 pages in length, he does not allege why the regulation applies to him. However, a newspaper article attached to the complaint states that Valdez is in prison because he "was convicted in 1993 of raping a 13-year old girl and then, along with his father, attempting to have her killed." Complaint, Exh. E, p. 2.

1 Valdez has been in prison since 1995. Valdez met his wife a few years ago while he was in prison
2 and married her in February 2004. Complaint, Exhs. E & K.

3 The complaint alleges the following:

4 On August 17, 2003, a correctional sergeant interrupted and terminated Valdez's visit with
5 his then-fiancée, her 8-year old daughter and her 13-year old son. The termination was due to the
6 sergeant's discovery of a CDC 128-B chrono dated July 16, 2003 which documented the § 3173.1
7 bar to Valdez's family visits with minors. The termination of the visit was traumatic for him and
8 his visitors. Until August 17, 2003, Valdez had been able to visit with the children.

9 The regulation in question is § 3173.1 of title 15 of the California Code of Regulations.
10 The current version of § 3173.1 provides:

11 Visiting with minors shall be prohibited for any inmate sentenced to prison for violating
12 Penal Code section(s) 261, 264.1, 266c, 273d, 285, 286, 288, 288a, 288.5 or 289 unless
13 specifically authorized by a juvenile court, pursuant to Welfare and Institutions Code
14 section 362.6. Inmates may be prohibited from having contact or non-contact visits where
substantial evidence (e.g., court transcripts, police or probation officer reports or parole
revocation hearing finding describing the misconduct) of the misconduct described in
section 3177(b)(1) exists, with or without a criminal conviction.

15 Apparently there also is a proposed revision of § 3173.1 under consideration. Valdez contends
16 that the revision, if implemented, will not necessarily solve his problem because he still will not
17 be guaranteed contact visits with his step-children.

18 Valdez alleges that he has received no visits from his step-children since August 17, 2003,
19 and has received no visits from his wife for the last four months. Visits from his wife are not
20 restricted by the regulation unless she is a minor. Valdez also alleges that he has received no
21 letters from his wife and step-children and they refuse to accept his collect calls. Id. Letters and
22 telephone calls are not restricted by the regulation.

23 Valdez alleges that the regulation has violated his rights to equal protection, to due process
24 and to be free from ex post facto laws. He seeks damages as well as declaratory and injunctive
25 relief in his complaint. He also has moved for appointment of counsel to represent him in this
26 action.

DISCUSSION

A. Standard of Review

A federal court must engage in a preliminary screening of any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. See id. at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Analysis of Complaint1. Equal Protection Claim

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). When a prison regulation [or practice] impinges on inmates' constitutional rights (other than the right to racial equality), the regulation is valid if it is reasonably related to legitimate penological interests. Turner v. Safley, 482 U.S. 78, 89 (1987); Johnson v. California, 125 S. Ct. 1141, 1161(2005).

Valdez contends that the regulation violates his right to equal protection. He alleges that there is no rational relationship between the governmental interest and the regulation that impinges on his allegedly fundamental right to associate with his family. See Overton v. Bazzetta, 539 U.S.

1 126 (2003). He also appears to contend that the regulation makes an irrational distinction among
2 prisoners in that, due to the interplay of the statutory scheme and the regulation, only children who
3 were the victims of a prisoner's sex offense can potentially visit that prisoner, while children who
4 were not victimized by that prisoner cannot visit him. Liberally construed, the complaint states
5 a cognizable § 1983 claim for an equal protection violation. Valdez has adequately linked
6 defendants Jeanne Woodford, Colleen Levangie, J. Burleson, and A. P. Kane to this claim.

7
8 2. Due Process Claim

9 Interests protected by the Due Process Clause may arise from two sources--the Due
10 Process Clause itself and laws of the states. See Meachum v. Fano, 427 U.S. 215, 223-27 (1976).
11 Changes in conditions so severe as to affect the sentence imposed in an unexpected manner
12 implicate the Due Process Clause itself, whether or not they are authorized by state law. See
13 Sandin v. Conner, 515 U.S. 472, 484 (1995). Deprivations authorized by state law that are less
14 severe or more closely related to the expected terms of confinement may also amount to
15 deprivations of a procedurally protected liberty interest, provided that (1) state statutes or
16 regulations narrowly restrict the power of prison officials to impose the deprivation, i.e. give the
17 inmate a kind of right to avoid it, and (2) the liberty in question is one of "real substance." See id.
18 at 477-87. A prisoner's interest in unfettered visitation is not guaranteed by the Due Process
19 Clause itself. See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989).
20 California regulations have not created a protected interest in visitation. California Code of
21 Regulations title 15, § 3173 sets forth general substantive criteria which must be followed and
22 circumstances under which visitation must be approved. See, e.g., Cal. Code Regs. tit. 15, §
23 3173(l). However, § 3177(c) specifically provides that visitation may be discretionarily denied
24 for reasons other than those set forth in the regulations and § 3170(e) states that visits are subject
25 to denial or restriction as necessary to provide fair allocation of prison resources. This
26 reservation of the right to allow and disallow visits "is not such that an inmate can reasonably form
27 an objective expectation that a visit would necessarily be allowed absent the occurrence of one
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1 of the listed conditions." See Thompson, 490 U.S. at 464-65 (finding no protected liberty interest
2 in Kentucky regulations).

3 Valdez asserts that his right to due process was violated because prison officials used the
4 regulation to restrict his visits without giving him procedural protections (such as notice and an
5 opportunity to be heard) before making the decision. Because a visit may be denied regardless of
6 compliance with substantive criteria, the regulations' language is not sufficiently mandatory to
7 meet the first prong of the Sandin test, and therefore no protected liberty interest requiring
8 constitutional protection is created. Without a protected liberty interest, there is no due process
9 violation. The due process claim is dismissed without leave to amend.

10
11 3. Ex Post Facto Claim

12 The Ex Post Facto Clause of the U. S. Constitution prohibits any statute that (1) punishes
13 as a crime an act previously committed, which was innocent when done; (2) makes more
14 burdensome the punishment for a crime, after its commission; or (3) deprives one charged with
15 a crime of any defense available according to law at the time when the act was committed. See
16 Collins v. Youngblood, 497 U.S. 37, 41-46 (1990). "Changes in a prisoner's location, variations
17 of daily routine, changes in conditions of confinement (including administrative segregation), and
18 denials of privileges - matters which every prisoner can anticipate are contemplated by his original
19 sentence to prison - are necessarily functions of prison management that must be left to the broad
20 discretion of prison administrators." Jones v. Murray, 962 F.2d 302, 309 (4th Cir.) (quoting
21 Gaston v. Taylor, 340, 343 (4th Cir. 1991)), cert. denied, 506 U.S. 977 (1992). "It is precisely
22 because reasonable prison regulations, and subsequent punishment for infractions thereof, are
23 contemplated as part of the sentence of every prisoner, that they do not constitute additional
24 punishment and are not classified as ex post facto. Moreover, since a prisoner's original sentence
25 does not embrace a right to one set of regulations over another, reasonable amendments, too, fall
26 within the anticipated sentence of every inmate." Id. at 309-10; see also Gilbert v. Peters, 55 F.3d
27 237, 238 (7th Cir. 1995) (Clause "does not prohibit every alteration in a prisoner's confinement
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1 that may work to his disadvantage").

2 Valdez alleges that § 3173.1 violates the Ex Post Facto Clause of the U.S. Constitution
3 because it makes more burdensome his punishment and was enacted after his crimes that led to
4 his current incarceration. See Complaint, pp. 59-60. As the authorities cited in the preceding
5 paragraph suggest, the challenged regulation causes the kind of change in conditions of
6 confinement and denial of privileges that are functions of day-to-day prison management and are
7 not additional punishment for the crimes. Valdez had no right to have the prison regulations in
8 place at the time he committed his crimes remain in place and govern his conduct for the entirety
9 of his sentence. The ex post facto claim is dismissed without leave to amend.

10
11 C. Motion For Appointment Of Counsel

12 Valdez moves for an order appointing counsel to represent him in this action. A district
13 court has the discretion under 28 U.S.C. §1915(e)(1) to designate counsel to represent an indigent
14 civil litigant in exceptional circumstances. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th
15 Cir. 1986). This requires an evaluation of both the likelihood of success on the merits and the
16 ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues
17 involved. See id. Neither of these factors is dispositive and both must be viewed together before
18 deciding on a request for counsel under section 1915(e)(1). Here, exceptional circumstances
19 requiring the appointment of counsel are not evident. Based on the record before it, the court is
20 not able to determine that there is a likelihood of success on the merits and the complaint does
21 not raise particularly difficult legal claims. The motion for appointment of counsel is denied.

22
23 **CONCLUSION**

24 For the foregoing reasons,

25 1. Liberally construed, plaintiff's complaint states a claim for relief under 42 U.S.C.
26 § 1983 against defendants Jeanne Woodford, Colleen Levangie, J. Burleson, and A. P. Kane for
27 violating plaintiff's right to equal protection of the laws. Plaintiff's due process and ex post facto
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claims are dismissed. Defendants W. J. Hill, I. Guerra, and J. Lozada, whose involvement appears to relate to the absence of a hearing before plaintiff was barred from visiting with minors, are dismissed from this action. Because plaintiff had no right to a hearing before the restriction on his visitation rights was implemented, these defendants have no liability on that theory.

2. The clerk shall issue summonses and the United States Marshal shall serve, without prepayment of fees, the summons, a copy of the complaint, a copy of this order, and a copy of all the other documents in the case file upon these four defendants:

- (a) Jeanne Woodford (CDCR Director, employed at CDCR in Sacramento);
- (b) Colleen Levangie (assistant chief of the CDCR regulation and policy management branch, employed at the CDCR in Sacramento);
- (c) J. Burleson (CDCR appeals examiner, employed at the CDCR in Sacramento); and
- (d) A. P. Kane (warden, employed at CTF in Soledad).

3. In order to expedite the resolution of this case, the following briefing schedule for dispositive motions is set:

a. No later than **March 3, 2006**, defendants must file and serve a motion for summary judgment or other dispositive motion. If defendants are of the opinion that this case cannot be resolved by summary judgment, they must so inform the court prior to the date the motion is due.

b. Plaintiff's opposition to the summary judgment or other dispositive motion must be filed with the court and served upon defendants no later than **April 7, 2006**. Plaintiff must bear in mind the following notice and warning regarding summary judgment as he prepares his opposition to any summary judgment motion:

The defendants may make a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, dispose of your case. Generally, summary judgment must be granted when there is no genuine issue of material fact -- that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts

1 shown in the defendants' declarations and documents and show that there is a genuine issue of
2 material fact for trial. If you do not submit your own evidence in opposition, summary judgment,
3 if appropriate, may be entered against you. If summary judgment is granted, your case will be
4 dismissed and there will be no trial. (See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998)).

5 c. If defendant wishes to file a reply brief, he must file and serve the reply brief
6 no later than **April 21, 2006**.

7 4. All communications by plaintiff with the Court must be served on a defendant's
8 counsel by mailing a true copy of the document to defendant's counsel. The court may disregard
9 any document which a party files but fails to send a copy of to his opponent. Until a defendant's
10 counsel has been designated, plaintiff may mail a true copy of the document directly to defendant,
11 but once a defendant is represented by counsel, all documents must be mailed to counsel rather
12 than directly to that defendant.

13 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
14 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is
15 required before the parties may conduct discovery.

16 6. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the
17 Court informed of any change of address and must comply with the Court's orders in a timely
18 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
19 pursuant to Federal Rule of Civil Procedure 41(b).


20 7. Plaintiff is cautioned that he must include the case name and case number for this
21 case on any document he submits to this court for consideration in this case.

22 8. The parties are cautioned that there is a 25-page limit on the length of any motion
23 and opposition brief, and a 10-page limit on the length of any reply brief.

24 9. The motion for appointment of counsel is DENIED. (Docket # 3.)

25 IT IS SO ORDERED.

26 Dated: December 21, 2005

27 
28 SUSAN ILLSTON
United States District Judge